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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE LAWRENCE MACK BUCKNER and BARBARA JEAN BUCKNER, Debtors.	BAP No. EO-00-073
LAWRENCE MACK BUCKNER and BARBARA JEAN BUCKNER, Appellants, v. OKLAHOMA TAX COMMISSION and WILLIAM MARK BONNEY, Trustee, Appellees.	Bankr. No. 98-70810 Chapter 13 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

Before PUSATERI, BOULDEN, and KRIEGER, Bankruptcy Judges.

PUSATERI, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

Lawrence and Barbara Buckner ("Debtors") appeal from a bankruptcy court

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

order allowing the Trustee to conduct a Rule 2004 examination of Debtors. We affirm.

I. Jurisdiction and Standard of Review.

A bankruptcy appellate panel, with the consent of the parties, has jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy judges within this circuit. 28 U.S.C. § 158(a), (b)(1), (c)(1). As none of the parties have opted to have this appeal heard by the District Court for the Eastern District of Oklahoma, they are deemed to have consented to jurisdiction. 10th Cir. BAP L.R. 8001-1(d).

The Bankruptcy Appellate Panel may affirm, modify or reverse a bankruptcy court's judgment, order or decree, or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous. Fed. R. Bankr. P. 8013; *see First Bank v. Reid (In re Reid)*, 757 F.2d 230, 233-34 (10th Cir. 1985). Conclusions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Decisions under Fed. R. Bankr. P. 2004 are reviewed for an abuse of discretion. *In re Charters Int'l Co., Inc.*, Civ. A. No. 89-2231-O, 1990 WL 81764 (D. Kan. May 21, 1990).

II. Background.

Debtors are pro se debtors in a Chapter 13 case. Their sixty-month plan was confirmed in November 1998. Debtors and the IRS settled a claim dispute for approximately $48,000.

On August 24, 2000, the Trustee, William Bonney ("the Trustee"), filed a motion to conduct 2004 exam of Debtors. The motion requested testimony on all documents relating to the preparation of the Debtors' schedules and used in the preparation of Debtors' 1998 and 1999 tax returns. On August 28 the bankruptcy court entered ex parte orders granting the motion and setting the examination of Debtors for September 13, 2000.

On September 11, 2000, Debtors filed a motion to quash on the grounds that they were not provided adequate notice of the Trustee's motion and that the 2004 exam exceeded the scope of the Trustee's duties. The matter was set for evidentiary hearing on September 20, 2000. The Trustee filed a notice of intent to present evidence at the hearing. Debtors filed a notice of waiver of oral argument and requested the court vacate the hearing. The court advised the parties that the evidentiary hearing would be conducted as scheduled and directed the Debtors and all parties to appear and participate. Debtors responded by filing an objection to the Trustee calling witnesses at the hearing.

Based on the record made at the hearing, the bankruptcy court denied the motion to quash and directed Debtors to appear for a continued 2004 exam on October 3, 2000. Debtors did not include a copy of the transcript from this hearing in the record on appeal.

Debtors appeared at the 2004 exam with lockboxes, but they refused to answer any questions and read a statement that said, "Mr. Mather [Trustee's counsel], will you go on the record here that if I provide you with this information that I have here in this box, that it will not be used against me outside of this bankruptcy proceeding?" The Trustee declined, and the examination was continued.

On October 5, 2000, Debtors filed a Motion in Limine requesting the bankruptcy court limit the scope of the 2004 exam to inquiry into the financial affairs of the Debtors and prohibit questions regarding assistance in preparing their bankruptcy petition and schedules as well as tax returns. They also filed a "Notice of Supplementation of Rule 2004 Hearing held October 3, 2000," to which they attached an Exhibit of the written statement in their lockboxes, which said, in effect, that any assistance in preparing their bankruptcy pleadings and schedules came from God. The Trustee responded to the motion in limine,

arguing that it was inappropriate outside of jury trial matters.

At the hearing held November 1, 2000, the bankruptcy court denied the motion in limine based on the record made at the hearing. The court ordered Debtors to proceed with the 2004 exam immediately afterwards in the court's library. Debtors did not include a transcript from this hearing in the record on appeal.

Teresa Trissell, a trial attorney for the Justice Department appeared at the Rule 2004 examination as well as the attorney for the Trustee. Debtors testified that they used several websites to assist in preparation of their bankruptcy documents. They also attended a "freedom rally," where they purchased materials on tax and estate planning issues. Debtors testified that they had help from Dr. Tom Smith, a "legal research doctor," in preparing pleadings. Ms. Trissell also questioned Debtors about payments they had made to any of these individuals.

Debtors filed a Notice of Appeal on November 3, 2000, appealing the bankruptcy court decision regarding the Debtors' objection to the proof of claim of the IRS; Debtors' Motion in Limine; Debtors' motion to abate the proceedings; and the Motion of the IRS for summary judgment, all issued on November 1, 2000[1]. The only order included in the record on appeal is the order denying the motion in limine and directing continuation of the 2004 exam.

III. Discussion.

As a threshold matter, the Court addresses whether it has jurisdiction to hear this appeal. As a general rule, discovery orders are not appealable until the end of the case. *See Union Carbide Corp. v. U.S. Cutting Service, Inc.,* 782 F.2d 710, 712 (7th Cir. 1986). It is well-settled in this circuit that an order is not final unless it ends the litigation on the merits, leaving nothing for the court to do but

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[1] On September 18, 2000, Debtors filed an objection to the claim of the IRS and the Oklahoma Tax Commission. The IRS apparently prevailed on summary judgment, but it does not appear that Debtors appeal from any such order.

execute the judgment. *See In re Magic Circle Energy Corp.*, 889 F.2d 950, 953 (10th Cir. 1989). In this case, the Debtors' Chapter 13 plan was confirmed in 1998. Because the postconfirmation Rule 2004 examination is a separate proceeding and there is no indication that further action by the bankruptcy court will be forthcoming, we conclude the matter is final for purposes of appeal under § 158(d).

The Court notes that this case is rife with procedural problems, most likely attributable to Debtors' pro se status. However, pro se litigants must follow the same rules of procedure as other litigants. *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994). Debtors specifically appealed from the order regarding their objection to the proof of claim of the IRS, their motion to abate the proceedings, and the motion, but not order, of the IRS for summary judgment. Not one of these orders, however, is included in the record on appeal. The Court may decline to review an issue when a party does not fulfill its responsibility to provide a document necessary for the consideration and determination of the issue. *See Gowan v. United States Dept. of Air Force*, 148 F.3d 1182, 1192 (10th Cir. 1998); *see also Rios v. Bigler*, 67 F.3d 1543, 1553 (10th Cir. 1995) ("It is not this court's burden to hunt down the pertinent materials. Rather, it is Plaintiff's responsibility as the appellant to provide us with a proper record on appeal."). This Court cannot review the bankruptcy court's determination on these matters without reviewing the pleadings and orders. *See, e.g., United States v. Vasquez*, 985 F.2d 491, 494 (10th Cir. 1993) ("When the record on appeal fails to include copies of the documents necessary to decide an issue on appeal, the Court of Appeals is unable to rule on that issue.").

The Court further notes that Debtors did not specifically appeal from the preliminary order allowing the Rule 2004 exam or the order denying motion to quash. The time limits established for filing a notice of appeal are "'mandatory

and jurisdictional.'" *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 264 (1978) (quoting *United States v. Robinson*, 361 U.S. 220, 229 (1960)). Rule 8002 requires that a notice of appeal be filed within ten days of the entry of the judgment appealed. Fed. R. Bankr. P. 8002(a).

In this case, the order granting motion for 2004 exam was entered August 28, 2000. The Debtors did not file a motion to quash until September 11, 2000, more than ten days later. The motion to quash states that the 2004 exam exceeds the scope of the Trustee's duties. The order denying the motion to quash was entered September 22, 2000. The Debtors did not file a notice of appeal or motion to reconsider, but rather, a motion in limine on October 5, 2000, also more than ten days later. The order denying the motion in limine was entered November 3, 2000, and the notice of appeal was filed the same day. Debtors did not appeal the initial order granting the motion for 2004 exam or the order denying the motion to quash. Accordingly, the only order timely appealed appears to be the order denying the Debtors' motion in limine and directing continuation of the 2004 examination.

A motion in limine is designed to aid the trial process by enabling the court to rule in advance of trial on the relevance of certain forecasted evidence as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial. In this case, there were no issues definitely set for trial; Debtors were apparently attempting to pre-empt any future use of information gathered at the Rule 2004 examination.

Although incorrectly captioned, the motion in limine appears to be and will be construed by the Court as another attempt to limit scope of the 2004 exam. As a preliminary matter, we note again that our review is limited. A bankruptcy court's order regarding a Rule 2004 examination must be affirmed unless it constitutes an abuse of discretion. Reversal is appropriate only if the court

"'based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Hughes v. City of Fort Collins*, 926 F.2d 986, 988 (10th Cir. 1991) (quoting *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990)). In this circuit, abuse of discretion is defined as "'an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.'" *F.D.I.C. v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (quoting *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991) (further quotation omitted)). It is with this standard in mind that we review Debtors' arguments.

The Debtors argue that the Trustee exceeded the scope of his duties in conducting a "fishing expedition" during the Rule 2004 examination. They request that this Court reverse the bankruptcy court order allowing the examination to proceed and strike the information and transcript from the record. As a general rule, examinations under Rule 2004 are allowed for the purpose of discovering assets, examining transactions, and determining whether wrongdoing has occurred. *In re Duratech Indus., Inc.*, 241 B.R. 283, 289 (E.D.N.Y. 1999). Necessarily, the scope of Rule 2004 is extremely broad, and the rule itself is "'peculiar to bankruptcy law and procedure because it affords few of the procedural safeguards that an examination under Rule 26 of the Federal Rules of Procedure' offers." *In re Strecker*, 251 B.R. 878, 882 (Bankr. D. Colo. 2000) (quoting *In re GHR Energy Corp.*, 33 B.R. 451, 454 (Bankr. D. Mass. 1983)). In fact, Rule 2004 exams have been characterized as "fishing expeditions," although they are not without bounds. *In re Buick*, 174 B.R. 299, 305 (Bankr. D. Colo. 1994). Rule 2004 examinations cannot be used for the purpose of abuse or harassment, and the examination cannot go beyond the bounds of what is, or may be, relevant to the inquiry. *In re Symington*, 209 B.R. 678, 684-85 (Bankr. D. Md. 1997). Examinations under rule 2004 should not be used to annoy, embarrass or oppress the debtor. *In re Coffee Cupboard, Inc.*, 128 B.R. 509, 514 (Bankr.

E.D.N.Y. 1991).

Again, the Court notes a procedural error. Debtors' failure to provide the Court with a transcript of the bankruptcy court's findings from the hearing on the motion in limine or the hearing on the motion to quash frustrates any attempt to apply the abuse of discretion standard of review. As a general rule, failure to provide a trial transcript warrants affirmance of the trial court decision on appeal where the issue on appeal requires the appellate court to review the record in the trial court. *In re Rambo,* 209 B.R. 527, 530 (10th Cir. BAP 1997). Debtors' failure to supply the court with a transcript of the hearings makes it impossible for the Court to determine whether the bankruptcy court's order allowing the 2004 examination and declining to limit the scope of the examination was an abuse of discretion.

Although we premise our affirmance of the bankruptcy court's order denying the motion in limine and ordering the Rule 2004 examination to proceed without limiting the scope on Debtors' failure to provide an adequate record for review, we have, to the extent possible, considered Debtors' arguments, and we find them to be without merit. Certainly, inquiry by a Trustee regarding preparation of a debtor's bankruptcy schedules and tax returns is within the broad scope permitted a Rule 2004 examination. Accordingly, we hold that the bankruptcy court did not abuse its discretion in allowing the examination to proceed as requested.

IV. Conclusion.

The decision of the trial court is AFFIRMED.